Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

NORMAN LEE OOLEY, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether respondent validly consented to a search of his residence when he agreed to a term of probation that authorized any law enforcement officer to search respondent or his home.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-5a) is reported at 116 F.3d 370.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1997. A petition for rehearing was denied on September 11, 1997. App., *infra*, 6a. On December 1, 1997, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including January 9, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

1. In 1994, respondent Norman Lee Ooley, Jr., was convicted of second degree burglary in California state court. As a term of his probation, respondent agreed that his person or residence would be subject to search "at any time with or without a warrant, and with or without reasonable cause, when required by the P.O. [probation officer] or other law enforcement officer." App., *infra*, 2a. That term of probation is generally called the "Fourth Waiver." *Ibid.*[1]

In June 1995, California police officers searched respondent's residence without a warrant. They discovered a loaded pistol and ammunition. App., *infra*, 2a.

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[1] The California Supreme Court has held that the Fourth Waiver constitutes a valid consent to search. See *People* v. *Bravo*, 43 Cal.3d 600 (1987), cert. denied, 485 U.S. 904 (1988). The court in *Bravo* explained that "[a] probationer * * * consents to the waiver of his Fourth Amendment rights in exchange for the opportunity to avoid service of a state prison term," *id.* at 608, and stated that "[a] probationer's waiver of his Fourth Amendment rights is no less voluntary than the waiver of rights by a defendant who pleads guilty to gain the benefits of a plea bargain," *id.* at 609.

Respondent was charged in a three-count federal indictment with being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. 922(g)(1) and 924(a). App., *infra*, 2a. He entered a conditional guilty plea, reserving the right to appeal the district court's denial of his motion to suppress the seized evidence. *Id.* at 2a-3a.

2. The court of appeals vacated and remanded. App., *infra*, 1a-5a.[2] The court held that, "[w]ith respect to probationers, * * * the legality of a warrantless search depends upon a showing that the

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[2] The government argued in the court of appeals that "[respondent] is simply wrong when he presents the notion that federal standards are to be used to judge the validity of a California law enforcement officer's search of a California probationer who has agreed to a 'Fourth Waiver.'" Gov't C.A. Br. 20. The court of appeals interpreted that statement to mean that "[t]he government * * * asserts that we must look solely to California law rather than to federal law in order to determine the legality of the warrantless search of [respondent's] residence," App., *infra*, 3a, and it rejected that argument. The thrust of the government's argument, however, was that searches of state and federal probationers would be subject to different constitutional analysis precisely because state probationers—unlike their federal counterparts—had consented to suspicionless searches as a condition of probation. See Gov't C.A. Br. 17-18; see also *id.* at 14-15 (noting that, "when a [California] defendant bargains for probation rather than imprisonment, part of the quid pro quo is that the defendant waives any Fourth Amendment rights he or she may have") (citing *Bravo*, 43 Cal.3d at 608-609). As one judge in the Ninth Circuit has noted, there is some confusion in circuit law on the role of state law in analyzing state parole or probation searches, but it is clear that federal law should control the ultimate validity of the search. *United States* v. *Conway*, 122 F.3d 841, 843-844 (9th Cir. 1997) (Wallace, J., concurring), petition for cert. pending, No. 97-6957 (Nov. 26, 1997).

search was a true probation search and not an investigation search." *Id.* at 4a. It stated that, "[u]nlike an investigation search, a probation search should advance the goals of probation, the overriding aim of which is to give the probationer a chance to further and to demonstrate his rehabilitation while serving a part of his sentence outside the prison walls." *Id.* at 4a-5a (brackets and internal quotation marks omitted). The court also asserted that a probation search "cannot be a mere 'subterfuge' enabling the police to avoid having to obtain a search warrant" and indicated that, "at a minimum, the 'police must have reasonable suspicion, that an item to be searched is owned, controlled, or possessed by [the] probationer.'" *Id.* at 5a (quoting *United States* v. *Davis*, 932 F.2d 752, 758 (9th Cir. 1991)). The court of appeals vacated the district court's decision and remanded the case for further proceedings to determine "whether the conduct complained of was a probation search rather than an investigation search." *Ibid.*

REASONS FOR GRANTING THE PETITION

This Court's decisions make clear that "a search conducted pursuant to a valid consent is constitutionally permissible," *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973), and that the validity of the search does not turn on the officers' possession of either individualized suspicion or a warrant. Accord, *e.g.*, *Illinois* v. *Rodriguez*, 497 U.S. 177, 181 (1990); *Zap* v. *United States*, 328 U.S. 624, 628 (1946). As a condition of his probation, respondent agreed in writing that his person or residence could be searched "at any time with or without a warrant, and with or without reasonable cause." App., *infra*, 2a. The agreement by its terms extends to searches conducted by a pro-

bation officer or "other law enforcement officer." *Ibid.* Thus, if the Fourth Waiver constitutes a valid consent to search, there would be no basis for suppressing the evidence obtained by the police in this case, regardless of whether the search is characterized as a "probation search" or an "investigation search."[3] It would likewise be irrelevant whether the officers conducting the search had reasonable suspicion of wrongdoing. In contrast to the Ninth Circuit, the California Supreme Court has held searches under identical conditions to be valid. See note 1, *supra.*

On November 26, 1997, this Court granted the petition for a writ of certiorari in *Pennsylvania Board of Probation and Parole* v. *Scott*, No. 97-581. The Court invited the parties to brief and argue the following question: "Must a search of a parolee's residence be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to searches as a condition of his parole?"[4] If this Court concludes that reasonable suspicion is not required to justify a consent search in such a case, its decision will very likely be dispositive of the validity of the search here. Under those circumstances, a grant of certiorari and a remand for further consideration would be warranted. We therefore suggest that the petition be held pending this Court's decision in *Scott* and disposed of as appropriate in light of that decision.

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[3] The California Supreme Court has construed the Fourth Waiver to authorize a search conducted "for a proper probation or law enforcement purpose." *Bravo*, 43 Cal.3d at 609.

[4] *Scott* also presents the question whether the exclusionary rule applies to parole revocation proceedings.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *Pennsylvania Board of Probation and Parole* v. *Scott*, No. 97-581, and disposed of as appropriate in light of the resolution of that case.

Respectfully submitted.

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JANUARY 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-50279

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

NORMAN LEE OOLEY, JR., DEFENDANT-APPELLANT

Argued and Submitted,
March 6, 1997, as to Appellant

Submitted March 6, 1997,
as to Appellee*

Decided June 25, 1997

Before: SCHROEDER, WIGGINS, and LEAVY, Circuit Judges.

LEAVY, Senior Circuit Judge:

In this case we must determine whether the district court erred by denying without an evidentiary hearing a motion to suppress evidence obtained in a warrantless search of the defendant's residence. For

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* The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument as to appellee. Fed. R.App. P. 34(a) and Ninth Circuit Rule 34-4.

the reasons which follow, we vacate and remand for further proceedings.

FACTS AND PRIOR PROCEEDINGS

On December 29, 1994, Norman Lee Ooley, Jr. was convicted in California state court on a charge of second degree burglary. As a condition of his probation, Ooley agreed in writing to a so-called "Fourth Waiver", *i.e.*, he consented to "[s]ubmit [his] person, property, place of residence, vehicle, personal effects to search at any time with or without a warrant, and with or without reasonable cause, when required by the P.O. [probation officer] or other law enforcement officer." SER at 2.

Less than six months later, Escondido police officers arrested Ooley on suspicion of burglary following a high speed automobile chase. In Ooley's truck police found burglary tools and weapons, including ammunition and a loaded "zip gun." Shortly thereafter, Escondido police officers conducted a warrantless search of Ooley's residence where they found, *inter alia*, a loaded pistol and ammunition. The Escondido police contacted the federal Bureau of Alcohol, Tobacco and Firearms ("ATF"). The ATF later determined that the pistol and ammunition seized from Ooley's house had not been manufactured in California.

On September 20, 1995, a federal grand jury handed down a three-count indictment charging Ooley with being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a). Ooley filed various pretrial motions, including a motion to suppress the evidence against him. In that motion, Ooley argued that the warrantless search of his residence had been an investigation search rather

than a probation search and therefore ran afoul of the Fourth Waiver condition of his probation. The district court denied Ooley's motion to suppress without conducting an evidentiary hearing. Ooley then entered a conditional guilty plea to all three counts of the indictment pursuant to Fed.R.Crim.P. 11(a)(2). The district court sentenced Ooley to fifteen months in prison, two years of supervised release, and imposed a $150 penalty assessment. Ooley has timely appealed. We have jurisdiction under 28 U.S.C. § 1291, and review *de novo*. *See United States v. Polanco*, 93 F.3d 555, 560 (9th Cir.), *cert. denied*, — U.S. ——, 117 S.Ct. 405, 136 L.Ed.2d 319 (1996).

ANALYSIS

The government argues that Ooley consented to the warrantless search of his residence by having accepted, as a condition of his probation, the state's requirement that he relinquish his Fourth Amendment protections. The government further asserts that we must look solely to California law rather than to federal law in order to determine the legality of the warrantless search of Ooley's residence. While conceding, as he must, the legality of the Fourth Waiver as a condition of his state probation, *see Griffin v. Wisconsin*, 483 U.S. 868, 872-73, 880, 107 S.Ct. 3164, 3167-68, 3172, 97 L.Ed.2d 709 (1987), Ooley argues that the validity of a warrantless search conducted by state law enforcement officers is ultimately a question of federal law.[1]

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[1] Ooley also contends that the search was improper because the police conducted it without first determining whether Ooley was a probationer subject to a Fourth Waiver condition. This contention finds no support in the law. *See People v. Velasquez*, 21 Cal.App.4th 555, 26 Cal.Rptr.2d 320, 321-22 (1993)

Ooley is right. While federal courts must look to state law to determine the validity of the underlying probation condition itself, *id.* at 875, 107 S.Ct. at 3169, and may consider state precedent for its persuasive value, *United States v. Davis*, 932 F.2d 752, 758 (9th Cir.1991) (as amended), "the validity of a search conducted by state law enforcement officers is ultimately a question of federal law." *Id.*

With respect to probationers, we have long recognized that the legality of a warrantless search depends upon a showing that the search was a true probation search and not an investigation search. *See, e.g., United States v. Vought*, 69 F.3d 1498, 1501 (9th Cir.1995); *United States v. Watts*, 67 F.3d 790, 794 (9th Cir.1995), *rev'd on other grounds*, — U.S. ——, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997); *United States v. Davis*, 932 F.2d at 758; *United States v. Harper*, 928 F.2d 894, 897 (9th Cir.1991); *United States v. Butcher*, 926 F.2d 811, 815 (9th Cir.1991); *United States v. Richardson*, 849 F.2d 439, 441 (9th Cir.1988); *United States v. Jarrad*, 754 F.2d 1451, 1454 (9th Cir.1985); *United States v. Cordova*, 650 F.2d 189, 190 (9th Cir.1981) (per curiam); *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 263 (9th Cir.1975) (en banc) (federal probationer); *Latta v. Fitzharris*, 521 F.2d 246, 249 (9th Cir.1975) (en banc); *Smith v. Rhay*, 419 F.2d 169, 162-63 (9th Cir.1969).

Unlike an investigation search, a probation search should advance the goals of probation, the overriding

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(investigating officer's lack of knowledge concerning adult defendant's probationary status irrelevant for purposes of Fourth Waiver searches under California law); *In re Tyrell J.*, 8 Cal.4th 68, 32 Cal.Rptr.2d 33, 44, 876 P.2d 519, 530 (1994) (same with respect to juvenile offender).

aim of which "is to give the [probationer] a chance to further and to demonstrate his rehabilitation while serving a part of his sentence outside the prison walls." *Latta v. Fitzharris*, 521 F.2d at 249. *See also United States v. Merchant*, 760 F.2d 963, 969 (9th Cir. 1985) (a probation search must involve "a genuine attempt to enforce probation"). While the warrantless search of a probationer's home need not necessarily be initiated, conducted, or even supervised by a probation officer to qualify as a probation search, it cannot be a mere "subterfuge" enabling the police to avoid having to obtain a search warrant (oftentimes characterized as using probation officers as "stalking horses" for the police). *See United States v. Davis*, 932 F.2d at 758 (at a minimum, the "police must have reasonable suspicion, that an item to be searched is owned, controlled, or possessed by probationer, in order for the item to fall within the permissible bounds of a probation search").

The district court's denial of Ooley's motion to suppress can be upheld only if the record shows that the warrantless search was a true probation search and not an investigation search. As we are unable to determine from this record whether the conduct complained of was a probation search rather than an investigation search, the decision of the district court must be vacated and the case remanded for an evidentiary hearing on this issue.

VACATED and REMANDED for further proceedings.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-50279

D.C. No. CR-95-01558-MLH

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

NORMAN LEE OOLEY, JR., DEFENDANT-APPELLANT

[Filed Sept. 11, 1997]

ORDER

Before: SCHROEDER, WIGGINS, and LEAVY, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Schroeder has voted to reject the suggestion for rehearing en banc, and Judges Wiggins and Leavy have so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.